



MISSISSIPPI ETHICS COMMISSION

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August 4, 2017

VIA U.S. MAIL

Mr. Christopher J. Latimer
Attorney at Law
Mitchell, McNutt & Sams
P.O. Box 947
Oxford, MS 38655

Re: Public Records Case Nos. R-17-013 & R-17-018; Aasand vs. City of Starkville

Mr. Latimer:

Enclosed please find a copy of the Preliminary Report and Recommendation in the above referenced cases. This Preliminary Report and Recommendation was prepared in accordance with Rule 5.6, Rules of the Mississippi Ethics Commission, and was presented to the Ethics Commission at its open meeting on Friday, August 4, 2017.

Within five (5) business days of receiving a copy of this Preliminary Report and Recommendation, any party may file specific written objections to the Preliminary Report and Recommendation. In the event either party files an objection to the Preliminary Report and Recommendation that would necessitate a hearing before the hearing officer, the undersigned hearing officer proposes to set this matter for hearing at 10:00 a.m., on Wednesday, August 23, 2017 at the offices of the Mississippi Ethics Commission in Jackson, Mississippi. If a hearing is set in this matter, the parties will be notified by a Notice of Hearing issued by the hearing officer.

If no objection to the Preliminary Report and Recommendation is received within the time provided above, the right to a hearing in this matter shall be deemed waived and the undersigned hearing officer shall issue a Final Order substantively identical to this Preliminary Report and Recommendation.

Should you have any questions or concerns, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in black ink that reads "Chris Graham".

CHRIS GRAHAM
Hearing Officer,
Mississippi Ethics Commission

cc: Mr. Kenneth E. Aasand
207 John Wesley Road
Starkville, MS 39759

Enclosure

BEFORE THE MISSISSIPPI ETHICS COMMISSION

KENNETH E. AASAND

COMPLAINANT

VS.

PUBLIC RECORDS CASE NOS. R-17-013 & R-17-018

CITY OF STARKVILLE

RESPONDENT

PRELIMINARY REPORT AND RECOMMENDATION

This matter came before the Mississippi Ethics Commission through two Public Records Complaints filed by Kenneth E. Aasand against the Mayor and Board of Aldermen for the City of Starkville (hereinafter “the City”). The Ethics Commission has jurisdiction over this matter pursuant to Section 25-61-13, Miss. Code of 1972. This Preliminary Report and Recommendation of the hearing officer is prepared in accordance with Rule 5.6, Rules of the Mississippi Ethics Commission.

Within five (5) business days of receiving a copy of the Preliminary Report and Recommendation, any party may file specific written objections to the Preliminary Report and Recommendation. Failure by the respondent to file an objection waives the respondent’s right to a hearing on the merits.

I. PROPOSED FINDINGS OF FACT

1.1 This matter involves two public records requests submitted by Aasand to the City. On March 28, 2017, Aasand submitted the first request seeking copies of the Starkville Municipal Airport Board’s meeting minutes for the months of December 2016, January 2017 and February 2017. Aasand allegedly never received a response from the City concerning this request and submitted a public records complaint with the Ethics Commission on April 18, 2017, the fifteenth (15th) working day after he submitted his public records request. Apparently, Aasand did not follow-up with city officials concerning his public records request prior to filing his complaint with the Ethics Commission.

1.2 Based on the City’s response to the public records complaint, the city officials responsible for obtaining records and responding to the request failed to communicate with each other concerning the request. City Clerk Lesa Hardin received the public records request and forwarded it to the airport manager. The Airport Manager, Rodney Lincoln, allegedly retrieved the airport board minutes to be scanned “for production by email.” The city clerk claims “she was not notified that the minutes had been scanned . . . and were ready for production.” The city’s response states “[the] actual production of the minutes was not followed up on by anyone.” Neither the City nor Aasand communicated with the other concerning the status of the City’s response to Aasand’s public records request. The City produced the minutes to Aasand after receiving a copy of the complaint from the Ethics Commission.

1.3 In a prior public records case involving Aasand and the City, the City failed to provide a timely response to a public records request submitted by Aasand in violation of the Public Records Act. In that case, “a deputy clerk failed to notify the city clerk of Aasand’s public

record request when he submitted it, which resulted in the delay.” See Final Order, Public Records Case No. R-16-046. The city acknowledges that it put procedures in place following Case No. R-16-046 to prevent delays due to staff communication errors.

1.4 On April 19, 2017, Aasand submitted a second public records request to the City requesting “any public records . . . from [February 26, 2016] until [February 29, 2016], or any written correspondence relating to the Mayor’s investigation of my claim that the City of Starkville sold aircraft fuel belonging to Grassroots Aviation.” Aasand allegedly never received a response from the City concerning this request and filed a second complaint with the Ethics Commission.

1.5 In response to the complaint, the City acknowledges receipt of Aasand’s second public records request. The city clerk received potentially responsive documents from city officials and forwarded these documents to the city attorney for review. “The city attorney provided advice to [the city clerk] on April 27, 2017, about whether the [documents] were responsive to the request and ripe for production. . . .” At this time, the City had already received a complaint concerning Aasand’s first public records request. Nonetheless, the city clerk did not provide Aasand documents responsive to the second public records request until May 23, 2017, which is twenty four (24) business days after receipt of the second public records request.¹

1.6 The City notes that Aasand received documents responsive to the request before the City received a copy of his public records complaint concerning these documents. The City did not request an extension of time to respond to Aasand’s second public records request. Neither the City nor Aasand communicated with the other concerning the status of the response to his public records request.

1.7 The City claims that it “is working to put structures and procedures in place to avoid untimely production in the future, and requests that the Ethics Commission not impose sanctions or penalties.”²

II. PROPOSED CONCLUSIONS OF LAW

2.1 Section 25-61-5(1)(a), Miss. Code of 1972, of the Public Records Act of 1983 mandates that “[n]o public body shall adopt procedures which will authorize the public body to produce or deny production of a public record later than seven (7) working days from the date of the receipt of the request for the production of the record.” Section 25-61-5(1)(b) allows up to fourteen working days for production of public records when the public body provides a specific, written explanation why the records cannot be produced within seven days. The City failed to timely respond to either of Aasand’s public records requests, and did not request any extension of time, in clear violation of Section 25-61-5.³

2.2 The Legislature has imposed an obligation on public bodies to provide the public

¹ The City states it supplemented the response on June 2, 2017, and provided Aasand an email inadvertently left out of the original production.

² The City made a similar statement in its response for the prior case decided by the Ethics Commission, Public Records Case No. R-16-046.

³ Moreover, the City did not follow its own public records policy which closely resembles the requirements in the Public Records Act.

timely access to non-exempt public records. The City's failure to communicate with Aasand or provide him timely access to the records which are the subject of this matter is unreasonable. This case exhibits poor communication between city department heads and an unreasonable failure to timely communicate with Aasand concerning his public records requests. While these actions are mitigated by Aasand's failure to follow-up concerning his requests, the City's actions are unreasonable and do not comport with the requirements of the Public Records Act. Moreover, the City cannot unilaterally delay responding to a fairly straight-forward public records request simply because the city clerk is busy attending to other matters, especially without seeking an agreement from Aasand or even informing Aasand of the delay.

2.3 Section 25-61-15 states that "[a]ny person who shall deny to any person access to any public record which is not exempt from the provisions of this chapter or who charges an unreasonable fee for providing a public record may be liable civilly in his personal capacity in a sum not to exceed One Hundred Dollars (\$100.00) per violation, plus all reasonable expenses incurred by such person bringing the proceeding." Based on the record in this case, the city clerk was responsible for receipt of the public records requests and, ultimately, providing Aasand a response to those requests. The city clerk failed to timely communicate with other city officials concerning the status of the first public records request and failed to timely communicate with Aasand concerning both public records requests. Moreover, the city clerk failed to timely remit documents she received which were responsive to Aasand's second public records request. Under this record, a civil penalty in the amount of one hundred dollars (\$100.00) is warranted against the city clerk.

2.4 The city attorney is hereby ordered to immediately provide a copy of this Preliminary Report and Recommendation to Ms. Hardin who shall have an opportunity to respond to this Preliminary Report and Recommendation within the timeframe set forth in Rule 5.6, Rules of the Mississippi Ethics Commission, and as explained in more detail below.

2.5 Pursuant to Section 25-61-13, the Ethics Commission may "order the public body and any individual employees or officials of the public body to . . . take other reasonable measures necessary, if any, to comply with [the Act.]" City officials who assist with responses to public records requests should receive a copy of the Final Order issued in this case and be placed on notice that their failure to timely and completely respond to public records requests can result in the imposition of a civil penalty against the individuals who violate the Act. See Section 25-61-15.

III. PRELIMINARY RECOMMENDATION

The undersigned hearing officer proposes to recommend the following:

3.1 The Ethics Commission should find that the City of Starkville violated Section 25-61-5(1)(a), Miss. Code of 1972, by failing to timely respond to both of Aasand's public records requests.

3.2 The Ethics Commission should find Ms. Lesa Hardin, City Clerk, civilly liable, in her personal capacity, in the amount of One Hundred Dollars (\$100.00), for her failure to timely

communicate with Aasand concerning both public records requests and for her failure to timely produce documents that she received which were responsive to his second public records request.

3.3 The Ethics Commission should order the city attorney to provide a copy of the Final Order issued in this case to the mayor and all aldermen and all City department heads with instruction for those department heads to provide a copy to any employees who regularly assist in responding to public records requests.

NOTICE OF PROPOSED HEARING DATE

Pursuant to Rule 5.6, Rules of the Mississippi Ethics Commission, within five (5) business days of receiving a copy of the Preliminary Report and Recommendation, any party, including the city clerk, may file specific written objections to the Preliminary Report and Recommendation. In the event any party files an objection to any finding of fact in the Preliminary Report and Recommendation that raises a factual issue which would necessitate a hearing before the hearing officer, the hearing officer proposes to tentatively set this matter for hearing at 10:00 a.m., on Wednesday, August 23, 2017 at the offices of the Mississippi Ethics Commission in Jackson, Mississippi. If a hearing is necessary, the parties will receive a notice of hearing from the hearing officer setting the date and time of the hearing.

Should any party wish to present further briefing, but not request a hearing, on any matter raised by this Preliminary Report and Recommendation, that party is directed to submit such briefing to the hearing officer within five (5) business days of receiving a copy of the Preliminary Report and Recommendation. Any objection or briefing submitted by any party should clearly indicate whether a hearing is requested and the specific factual findings which are disputed.

SUBMITTED this the 4th day of August, 2017.



CHRIS GRAHAM, Hearing Officer
Mississippi Ethics Commission